APPENDIX.

OPINION OF APPELLATE COURT.

(See certified copy.)

AT A TERM OF THE APPELLATE COURT, Begun and held at Chicago, on Tuesday, the Seventh day of April in the year of our Lord One Thousand Nine Hundred and Forty-Two within and for the First District of the State of Illinois.

Present:

Hon. William H. McSurely, Presiding Justice; Hon. David F. Matchett, Justice; Hon. John M. O'Connor, Justice.

Sheldon W. Govier, Clerk; Thomas J. O'Brien, Sheriff.

BE IT REMEMBERED, That on the 20th day of April, A. D. 1942, there was filed in the office of the Clerk of said Court, an opinion of said Court, in words and figures following to-wit:

Mary B. Sevier, Administratrix of the Estate of Albert E. Sevier, deceased,
Appellee,

No. 41808 *vs.*

Charles M. Thomson, Trustee of Chicago and North Western Railway Company,
Appellant.

} Appeal from Superior Court of Cook County

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant under the provisions of the Federal Employers' Liability act to recover for the death of her husband, Albert E. Sevier; upon the

first trial she had a verdict and judgment for $15,000; a new trial was granted and this court, granting leave to appeal from that order, affirmed it. (305 Ill. App. (abst.) 165.) Upon the second trial plaintiff had a verdict and judgment for $20,000, and this appeal is from that judgment.

Our former opinion outlines the facts substantially as follows. Between 9 and 10 o'clock on the night of May 21, 1937, defendant's southbound freight train consisting of 86 empty cars on which Sevier was employed as head brakeman, stalled while going up a rather steep hill about 2 miles north of Buda, Illinois; Sevier was riding in the engine on the fireman's or east side of the train; he inquired of the engineer if he should drop off the train and investigate as to the cause of the stalling; the engineer assented to this and Sevier walked back to see what was wrong.

The evidence tends to show that Sevier decided to cut the train between the 36th and 37th cars. When a train must be cut in two under such circumstances it is uncoupled about the middle of the train and the engine then proceeds with the forward section to the next place on the line where there is a sidetrack and these cars are left there; the engine then returns to the rear section and, coupling on to it, hauls it to the sidetrack where the two sections are then coupled together and the train proceeds on its way. The evidence tends to show that Sevier followed the usual procedure in such cases, closing the angle cocks—one on the rear of the 36th car and the other on the front of the 37th car, then uncoupling the automatic air brakes between the two cars. Defendant says that at this point the next thing to do is to open the rear angle cock, thus setting the air brakes so the rear cars cannot move. Sevier crossed over to the engineer's or west side of the train; the engineer then backed up the train so as to

take the strain off the draw bars and Sevier pulled the pin by using a lever on the side of the car, thus cutting the train at this point. When the process of cutting the train is completed the brakeman ordinarily signals the engineer to go ahead with the forward section of the train.

Defendant argues that plaintiff failed to set the brakes on the rear section by reopening the angle cock, which would set the brakes, and that as the result of this failure, when the cars were uncoupled the unbraked rear section started to move down hill and that to stop this Sevier went between the two sections and closed the angle cock on the car at the head of the rear section, thus stopping it—witnesses say suddenly, and that while doing this he was caught between the stopped rear section and the backing forward section and crushed to death.

The evidence showed that there were two movements backward of the train. The first enabled Sevier to pull the pin and uncouple the cars. The jury could properly believe that when this was done he signaled to the engineer with the lantern he was carrying that the train had parted. Defendant argues this signal was to back up, but there was testimony to the contrary. It would be hardly reasonable to believe that after the cars had been uncoupled Sevier would signal the engineer to back up, for there would then be no necessity for backing the forward section of the train. It would be much more reasonable to believe that the signal to the engineer was to indicate that the cut had been made so that the forward section could proceed on its way to the next siding.

This is not inconsistent with defendant's argument that Sevier, before uncoupling the cars, did not close the angle cock on the rear section and hence it commenced to move down the hill. Sevier could reasonably assume that when he uncoupled the cars and had so signaled the engineer, the forward section of the train would proceed southward

and he could safely proceed to close the angle cock on the first rear section car thus stopping it, wholly unaware that the forward section, with no signal from the engine, was backing toward the rear section. This is supported by the fact that Sevier's back was toward the forward section, which backed between "20 and 60 feet" before it ran into the rear section which was braked to a standstill. If the forward section had not so backed the accident would not have happened.

In any event we cannot say that the jury could not reasonably accept plaintiff's version of the manner in which the accident happened. Certainly all reasonable men would not agree that the accident was caused solely by the negligence of Sevier and that there was no negligence on the part of the engineer of the train.

Plaintiff also says that defendant's rule 14 requires that a signal to back be acknowledged by the engineer with three short whistles of the engine, and that even if Sevier's signal to the engineer was a back-up signal this rule was violated by the engineer's failure to sound the whistle. In many cases involving similar facts judgments in favor of the plaintiffs were sustained. *Waiswila* v. *Illinois Central R. Co.*, 220 Ill. App. 113, 118; *Central R. Co. of N. J.* v. *Colasurdo*, 192 Fed. 901; *Gaffney* v. *N. Y. Consolidated R. Co.*, 220 N. Y. 34; *Musgrove* v. *M. & L. S. Ry. Co.*, 259 Mich. 469; *Lancaster* v. *Fitch*, 239 S. W. (Texas Civ. App.) 265. In *Roth* v. *Schaefer*, 300 Ill. App. 464, 469, we said: "In a case based on defendants' claimed negligence it is not necessary that the evidence demonstrate such negligence, 'but responsibility for the accident must be determined upon the reasonable conclusions to be drawn from the evidence'." (Citing *Denny Bros.* v. *Goldblatt*, 298 Ill. App. 325 and *Union Pacific R. Co.* v. *Huxoll*, 245 U. S. 535.)

Defendant argues at some length that there were reversible errors in the rulings of the trial court in the admission

and exclusion of evidence. While some of these rulings might be open to slight objection, yet we find nothing of sufficient importance to demand a reversal.

Neither were there errors in the giving or refusing of instructions. They were for the most part passed upon and approved in our prior opinion in this case. (305 Ill. App. 165.)

We find no procedural errors which would require a reversal. The decisive questions presented relate to the facts, and as two juries in this case have found for the plaintiff and the verdict is reasonably consistent with the evidence, we would not be justified in reversing for a third trial.

The judgment is affirmed.

AFFIRMED.

MATCHETT AND O'CONNOR, JJ., CONCUR.

I, Sheldon W. Govier, Clerk of the Appellate Court, in and for the First District of the State of Illinois and keeper of the records, files and seal thereof, Do HEREBY CERTIFY That the foregoing is a true copy of the opinion of the said Appellate Court in said cause, as appears of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, at Chicago this 14th day of December in the year of our Lord one thousand nine hundred and forty-two.

(Seal)

Sheldon W. Govier,
Clerk of the Appellate Court of the First District, Illinois.